

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROLYN K. SCHILD)	
Claimant)	
VS.)	
)	Docket Nos.186,824 and
)	186,825
USD 259)	
Respondent)	
Self Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	
)	
)	

ORDER

Respondent asked the Appeals Board to review the September 30, 1996, Award entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument by telephone conference on March 20, 1997.

APPEARANCES

Respondent, a qualified self-insured, appeared by its attorney, Robert G. Martin of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Marvin R. Appling of Wichita, Kansas. The claimant did not appear, as she had settled her claims with respondent in the settlement hearing heard on January 16, 1995. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted stipulations listed in the Administrative Law Judge's Award.

ISSUES

The one issue before the Appeals Board is the liability of the Kansas Workers Compensation Fund (Fund).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Claimant and the respondent settled claimant's workers compensation claims on January 16, 1995, before a Special Administrative Law Judge. The settlement hearing transcript was made a part of the record and indicates claimant received a lump sum payment of \$24,500 that represents permanent partial disability benefits of approximately 30 percent. The settlement included both docketed cases.

The claimant filed two separate Applications for Hearings before the Division of Workers Compensation on February 11, 1994. One application was assigned Docket No. 186,824 and alleged a date of accident from October 1992 through March 4, 1993, for repetitive bilateral shoulder, arm, and wrist injuries. Docket No. 186,825 was assigned to the other application that alleged an accident date of January 11, 1993, for an automobile accident that allegedly caused injury to claimant's upper back and neck.

Both the settlement hearing transcript and the stipulations of the respondent and the Fund indicated the date of accident that was settled was a period from October 1992 through March 4, 1993, that included the January 11, 1993 automobile accident. At the settlement hearing, all issues between the respondent and the Fund were reserved for further determination, except the Fund agreed to the reasonableness of the settlement with the claimant.

Before liability can be assessed against the Workers Compensation Fund, the respondent must prove the respondent either hired or retained claimant in its employment with knowledge claimant had an impairment which constituted a handicap. See K.S.A. 1992 Supp. 44-567(a). A handicapped individual is defined by K.S.A. 44-566 (Ensley) as one afflicted with an impairment of such character it constitutes a handicap in obtaining or retaining employment. The respondent's knowledge of the preexisting impairment may be

established by any evidence sufficient to satisfy the respondent's burden of proof. See K.S.A. 1992 Supp. 44-567(b).

Next, respondent must prove the resulting injury or disability either "would not have occurred but for the preexisting physical or mental impairment" or the resulting disability "was contributed to by the preexisting impairment." See K.S.A. 1992 Supp. 44-567(a)(1)(2).

The Administrative Law Judge found the respondent had failed to prove that claimant was a handicapped employee and denied respondent's request to shift liability to the Fund for the compensation benefits awarded to the claimant in the January 16, 1995, settlement.

The respondent, on the other hand, argues that the record contains credible and persuasive evidence that prior to October 1992, the starting date of claimant's period of accident, that respondent had knowledge that claimant was a handicapped employee and claimant's injury and resulting disability would not have occurred but for the preexisting impairment. The Appeals Board concludes, for the reasons set forth below, that the respondent has met its burden of proving Fund liability.

Claimant testified that on October 30, 1992, she injured her left arm, left shoulder, and upper arm, while opening a large five-gallon bucket of pickles. Claimant also testified she was traveling from her basic employment location, the School Service Center on January 11, 1993, for a work assignment at Northwest High School when she was involved in an automobile accident. Claimant injured her neck and both shoulders in that automobile accident. Following the automobile accident, claimant testified her symptoms in both shoulders continued to worsen as she performed her regular work activities to the point she had to leave her work as a result of the worsening symptoms on March 4, 1993. On that day, claimant was required to perform heavy, repetitive work of placing meat on carts and pushing the carts into the freezer for four hours. The remainder of the day she was required to perform the repetitive activity of dipping fruit into cups.

Respondent provided claimant with medical treatment through Eugene E. Kaufman, M.D., who placed claimant into a physical therapy program for some six months. However, claimant's shoulder injuries did not respond to the physical therapy treatment. Finally, Dr. Kaufman, on September 21, 1993, operated on claimant's right shoulder performing an AC joint resection, decompression of the anterior shoulder, partial resection of the coracoacromial ligament, bursectomy, and resection of the humeral spur. Dr. Kaufman released claimant to return to work January 20, 1994, with only a precautionary restriction of no working over head. Nevertheless, Dr. Kaufman rated claimant's right shoulder as having a loss of function of 10 percent for a 5 percent permanent partial functional whole body impairment.

Claimant was also examined by J. Stanley Jones, M.D., an orthopedic surgeon in Wichita, Kansas, for evaluation of her shoulder injuries. Dr. Jones took a history from the claimant and performed a physical examination concluding that she had a 12 percent permanent functional impairment of the left shoulder and an 8 percent permanent functional impairment of the right shoulder.

The resolution of the Fund liability issue in this case hinges on whether the claimant was a handicapped employee before the start of the stipulated period of accident from October 1992 through claimant's last day worked of March 4, 1993. Respondent points out in its submission letter to the Administrative Law Judge and also in its brief filed before the Appeals Board that a Form 88 was filed with the Division of Workers Compensation on February 10, 1992, that indicated claimant had a disability to her left shoulder. Another Form 88 was filed on May 26, 1992, indicating that claimant had a disability to her right arm. Those Form 88s were not admitted as evidence into the record. However, at oral argument before the Appeals Board, the Fund agreed that the Appeals Board could take official notice of those filings.

A Form 88 filing does not prove that an employee is handicapped. It only creates a presumption that the employer had knowledge of the employee's preexisting impairment. See, K.S.A. 1992 Supp. 44-567(b). The burden remains with the respondent to prove that claimant's preexisting impairment was of such character as to constitute a handicap in obtaining and retaining employment.

The Appeals Board concludes that claimant's testimony, coupled with Dr. Ernest R. Schlachter's testimony, satisfies respondent's burden that claimant was a handicapped employee before October 1992. Specifically, claimant testified she had reported injuries involving either one or both of her shoulders to the respondent in 1987, 1989, 1991, January 29, 1992 and May 13, 1992. Although claimant testified she had no permanent restrictions placed on her as a result of those injuries, she also established that in 1990 she consulted with respondent and requested to be transferred to lighter work because she was "being hurt." Furthermore, claimant established that following a right shoulder injury which occurred while she was mopping with a heavy mop on November 19, 1987, she was treated by a physician who diagnosed tendinitis in claimant's right arm and shoulder.

Ernest R. Schlachter, M.D. was the only physician to testify in this case. At respondent's request, Dr. Schlachter reviewed medical records of claimant's medical treatment from Doris G. North, M.D. and Eugene E. Kaufman, M.D. Dr. Schlachter also had Dr. Stanley Jones' medical report from his independent medical examination of claimant which contained his assessment of claimant's permanent functional disability. Dr. Schlachter opined claimant was a handicapped employee prior to October 1992. The doctor testified that claimant's preexisting chronic shoulder condition predisposed her to further injury. He further opined, but for claimant's preexisting shoulder condition, claimant would not have suffered injuries in October 1992 while employed by the respondent. Dr. Schlachter's opinion was that claimant's prior shoulder problems contributed 100

percent to her current disability. Dr. Schlachter was able to express an opinion that claimant had a preexisting impairment of function of both shoulders prior to her surgery, but he could not quantify the specific amount of the percentage of impairment. The Appeals Board finds that it is not necessary for the specific amount of preexisting impairment be found as long as the physician finds the current disability or injury would not have occurred but for or was contributed by the impairment. See Denton v. Sunflower Electric Co-Op, 12 Kan.App. 2d 262, 264, 740 P.2d 98 (1987), *aff'd*, 242 Kan. 430, 748 P.2d 420 (1988).

Therefore, the Appeals Board concludes that claimant's testimony and Dr. Schlachter's testimony established that claimant had a preexisting functional impairment of the bilateral shoulders, respondent had knowledge of the preexisting impairment, such preexisting impairment constituted a handicap, and claimant's current injury and disability would not have occurred but for the preexisting impairment. Respondent has met its burden of proving Fund liability and the Award of the Administrative Law Judge should be reversed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated September 30, 1996, is reversed and an award is entered in favor of respondent and against the Kansas Workers Compensation Fund for all the liability for the compensation benefits awarded to the claimant in the settlement hearing held January 16, 1995, before Special Administrative Law Judge James R. Roth.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the Workers Compensation Fund to be paid as follows:

Kelly, York and Associates, Ltd.	
Deposition of Earnest R. Schlachter	\$ 84.10
 Ireland Court Reporting, Inc.	
Deposition of Carolyn K. Schild	\$326.00

IT IS SO ORDERED.

Dated this ____ day of September, 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert G. Martin, Wichita, Kansas
Marvin J. Appling, Wichita, Kansas
Jon. L. Frobish, Administrative Law Judge
Philip S. Harness, Director